

①  
05 - 8 37 DEC 23 2005

NO. OFFICE OF THE CLERK

---

In the  
**Supreme Court of the United States**

---

THOMAS O'CONNOR; ANDREW STROBL,  
*Petitioners,*

v.

WASHBURN UNIVERSITY; BOARD OF REGENTS OF  
WASHBURN UNIVERSITY; JERRY B. FARLEY,  
individually and in his official capacity as  
President, Washburn University,  
*Respondents.*

On Petition for a Writ of Certiorari to the United  
States Court of Appeals for the Tenth Circuit

---

**PETITION FOR WRIT OF CERTIORARI**

---

ROBERT JOSEPH MUISE  
*Counsel of Record*  
THOMAS MORE LAW CENTER  
24 FRANK LLOYD WRIGHT DR.  
P.O. BOX 393  
ANN ARBOR, MI 48106  
(734) 827-2001

*Counsel for Petitioners*

## QUESTIONS PRESENTED

This case presents an Establishment Clause challenge to an anti-Catholic display on government property and an opportunity for this Court to clarify its muddled Establishment Clause jurisprudence. Many, including Justices on this Court, believe that the Court's modern Establishment Clause jurisprudence is in "hopeless disarray." See, e.g., *Rosenberger v. University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring in the judgment). Justice Kennedy's prediction in *Allegheny County* appears to have come true: "[A] jurisprudence of minutiae" relying on "little more than intuition and a tape measure" has resulted from the unclear and inconsistent analyses offered in the various opinions of this Court. *County of Allegheny v. A.C.L.U.*, 492 U.S. 573, 674-75 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

This is a case of first impression in that this Court has not had occasion to address an Establishment Clause challenge to a display that is hostile to religion. Petitioners suggest that for cases such as this, a traditional strict scrutiny analysis should apply. This approach is consistent with our Nation's history and traditions and with established precedent, which "forbids hostility toward any" religion. See *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). A strict scrutiny standard also provides a well-established and workable analytical framework within which to evaluate hostility claims under the Establishment Clause.

In the alternative, an evenhanded application of the present Establishment Clause jurisprudence compels a reversal in this anti-Catholic display case.

1. Should a strict scrutiny analysis apply for Establishment Clause challenges to government action that is hostile to religion, requiring a reversal in this case?
2. Does the evenhanded application of Establishment Clause jurisprudence compel a reversal in this hostility to religion case?

## **PARTIES TO THE PROCEEDING**

The Petitioners are Dr. Thomas O'Connor and Andrew Strobl ("Petitioners").

The Respondents are Washburn University, the Board of Regents of Washburn University, and Washburn University President Dr. Jerry B. Farley, individually and in his official capacity ("Respondents").

## TABLE OF CONTENTS

Questions Presented . . . . .	i
Parties to the Proceeding . . . . .	iii
Table of Contents . . . . .	iv
Table of Authorities . . . . .	vii
Opinions Below . . . . .	1
Jurisdiction . . . . .	1
Constitutional Provision Involved . . . . .	1
Statement of the Case . . . . .	1
I. Factual Background . . . . .	1
II. Proceedings Below . . . . .	7
Reasons for Granting the Petition . . . . .	7
I. The Court's Current Establishment Clause Jurisprudence is in Disarray and Leads to Inconsistent Results. . . . .	7
A. The Establishment Clause Permits Acknowledgment of Religion, but Forbids Hostility Toward Any . . . . .	9

B. This Court Should Adopt a Strict Scrutiny Standard of Review for Government Actions That Are Hostile to Religion under the Establishment Clause . . . . .	13
II. The Evenhanded Application of Establishment Clause Jurisprudence Compels a Reversal in this Case . . . . .	15
A. Application of the Present Establishment Clause Jurisprudence . . . . .	17
B. The "Purpose" and "Effect" of Respondents' Anti-Catholic Religious Display Are Unconstitutional . . . . .	19
i. The Actual "Purpose" Of Respondents' Anti-Catholic Religious Display Is Unconstitutional . . . . .	19
2. The "Effect" Of Respondents' Anti- Catholic Religious Display Is Unconstitutional . . . . .	23
Conclusion . . . . .	30
Appendix	
Appendix A United States Court of Appeals For the Tenth Circuit Opinion July 28, 2005 . . . . .	1a

**Appendix B**

**United States District Court for the District  
of Kansas Memorandum and Order**

**February 26, 2004 . . . . . 28a**

## TABLE OF AUTHORITIES

## Cases

<i>A.C.L.U. v. Schundler</i> , 168 F.3d 92 (3 <sup>rd</sup> Cir. 1999) . . . . .	8
<i>Bauchman v. West High Sch.</i> , 132 F.3d 542 (10 <sup>th</sup> Cir. 1997) . . . . .	8
<i>Capitol Square Review &amp; Advisory Bd. v. Pinette</i> , 515 U.S. 753 (1995) . . . . .	24
<i>Church of the Lukumi Babalu Aye, Inc v.</i> <i>City of Hialeah</i> , 508 U.S. 520 (1993) . . . . .	12, 13, 16
<i>Committee for Pub. Educ. &amp; Religious Liberty</i> <i>v. Nyquist</i> , 413 U.S. 756 (1973) . . . . .	16
<i>County of Allegheny v. A.C.L.U.</i> , 492 U.S. 573 (1989) . . . . .	i, 7, 16-18, 23, 24, 26, 28
<i>Doe v. Duncanville Indep. Sch. Dist.</i> , 994 F.2d 160 (5 <sup>th</sup> Cir. 1993) . . . . .	8
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987) . . . . .	7, 16, 19, 20, 22
<i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2004) . . . . .	7, 10
<i>Everson v. Board of Educ.</i> , 330 U.S. 1 (1947) . . . . .	15
<i>Freedom from Religion Found. v. City of Marshfield</i> 203 F.3d 487 (7 <sup>th</sup> Cir. 2000) . . . . .	14, 22



<i>Glassroth v. Moore</i> , 335 F.3d 1282 (11 <sup>th</sup> Cir. 2003) . . . . .	18
<i>Gonzales v. North Township of Lake County</i> , 4 F.3d 1412 (7 <sup>th</sup> Cir. 1993) . . . . .	22, 29
<i>Indiana Civil Liberties Union v. O'Bannon</i> , 259 F.3d 766 (7 <sup>th</sup> Cir. 2001) . . . . .	24
<i>Joki v. Board of Educ.</i> , 745 F.Supp. 823 (N.D.N.Y. 1990) . . . . .	25, 28
<i>Lamb's Chapel v. Center Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 . . . . .	8, 11, 17
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992) . . . . .	15
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) . . . . .	8, 17, 19, 23
<i>Linnemeir v. Board of Trustees of Purdue</i> , 260 F.3d 757 (7 <sup>th</sup> Cir. 2001) . . . . .	27
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984) . . . . .	i, 9-13, 16, 17, 19, 23, 25, 26
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983) . . . . .	10
<i>McCreary County v. A.C.L.U.</i> , 125 S.Ct. 2722 (2005) . . . . .	17
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961) . . . . .	10

<i>Rosenberger v. University of Virginia</i> , 515 U.S. 819 (1995) . . . . .	i, 7, 16
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000) . . . . .	18, 20
<i>Schneider v. New Jersey</i> , 308 U.S. 147 (1939) . . . . .	14
<i>Stone v. Graham</i> , 449 U.S. 39 (1980) . . . . .	18, 20
<i>Van Orden v. Perry</i> , 125 S.Ct. 2854 (2005) . . . . .	9, 10, 11, 17
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985) . . . . .	8, 20
<i>Washegesic v. Bloomingdale Public Schs.</i> , 33 F.3d 679 (6 <sup>th</sup> Cir. 1994) . . . . .	25, 29
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981) . . . . .	18
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952) . . . . .	9, 10
<b>Statutes</b>	
28 U.S.C. § 1254(1) . . . . .	1
U.S. Cons. Amend. I . . . . .	1

## **PETITION FOR WRIT OF CERTIORARI**

### **OPINIONS BELOW**

The opinion of the three-judge panel, App. 1a, appears at 416 F.3d 1216. The district judge's opinion, App. 28a, appears at 305 F.Supp.2d 1217 (D. Kansas 2004).

### **JURISDICTION**

The opinion of the panel was issued on July 28, 2005. A request for an extension of time in which to file this petition was granted, requiring that the petition be filed on or before December 27, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL PROVISION INVOLVED**

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

### **STATEMENT OF THE CASE**

#### **I. FACTUAL BACKGROUND.**

This case is an Establishment Clause challenge to a government display of an anti-Catholic religious symbol on the property of Washburn University, a public, municipal university located in Topeka, Kansas. On or about September 20, 2003, Washburn University began displaying at one of the most prominent and public outdoor locations on its campus a religious symbol entitled, "Holier than Thou."

**"Holier than Thou"** is a sculpture of a Catholic bishop with a grotesque facial expression wearing a distorted miter that resembles a phallus. See App. 26a (Attachment). A miter is a head covering worn by the pope and bishops as a mark of their office and is a symbol of the ecclesiastical authority of the Roman Catholic Church.

Inscribed on **"Holier than Thou"** are the words, **"The Cardinal."** A Cardinal is a Roman Catholic bishop who holds a particular office of importance in the Catholic Church. Cardinals are selected by the pope, and they are responsible for electing the next pope—the next successor of Peter—to lead the Church.

The Catholic bishop depicted in **"Holier than Thou"** is wearing a stole, which is a religious garment worn by Catholic priests and bishops when ministering the Sacraments, including the Sacrament of Penance. The **"Holier than Thou"** caption read as follows:

The artist says, "I was brought up Catholic. I remember being 7 and going into the dark confessional booth for the first time. I knelt down, and my face was only inches from the thin screen that separated me and the one who had the power to condemn me for my evil ways. I was scared to death, for on the other side of that screen was the persona you see before you."

When a bishop or priest is ministering the Sacrament of Penance he is not in his own person. Instead, he is **"in persona Christi,"** or **"in the person of Christ."** Moreover, it is heretical to claim that the priest or bishop has **"the power to condemn [the penitent] for [his] evil ways."**